

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§336.356, 336.1301, 336.1305, 336.1307, 336.1309 - 336.1311, and 336.1317; and the repeal of §336.1313.

Background and Summary of the Factual Basis for the Proposed Rules

This proposed rulemaking is needed to ensure compatibility with federal regulations promulgated by the Nuclear Regulatory Commission (NRC) which is necessary to preserve the status of Texas as an Agreement State under 10 Code of Federal Regulations (CFR) Part 150 and under the "Articles of Agreement between the United States Atomic Energy Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended." In most cases, rules which are designated by the NRC as compatibility items must be adopted by an Agreement State within three years of the effective date of the NRC rules. Additionally, Texas Health and Safety Code (THSC), §401.245, requires the TCEQ to periodically revise party state compact waste disposal fees. The proposed rulemaking would also adjust the surcharge fees for compact waste disposal and remove the annual requirement for rate adjustment for disposal of Low-Level Radioactive Waste (LLRW) to allow flexibility to incorporate rate adjustments on an as-needed basis.

Section by Section Discussion

The commission proposes non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish

consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§336.356, Soil and Vegetation Contamination Limits

The commission proposes to amend §336.356(c) to add the requirement that the licensees shall, to the extent practical, conduct operations to minimize the introduction of residual radioactivity into the site, including the subsurface.

§336.1301, Purpose and Scope

The commission proposes to amend §336.1301(a) to remove the sentence that the compact waste disposal facility (CWF) is expected to be the sole facility for disposal of LLRW for generators within the states of Texas and Vermont.

The commission proposes to amend §336.1301(b) to clarify that the commission will establish the maximum disposal rates charged by the licensee for disposal of party state compact waste.

The commission proposes to amend §336.1301(c) to make minor clarifying changes.

§336.1305, Commission Powers

The commission proposes to amend §336.1305(a) to clarify that the rates that the commission adopts are the maximum disposal rates for disposal of party state compact waste at the CWF and to also update the language from "establishing" to "determining."

The commission proposes to amend §336.1305(c) to change the rates from "initial" to "new" or "revised."

The commission proposes to amend §336.1305(e)(2) to correct an incorrect cross reference.

The commission proposes to amend §336.1305(f) to delete the word "initial" relating to rate application or revision because it is no longer needed.

The commission proposes to delete and move §336.1305(h) ("Initiation of rate revision by the executive director") to proposed §336.1311(d) with modifications as discussed later in this preamble.

§336.1307, Factors Considered for Maximum Disposal Rates

The commission proposes to amend §336.1307 to modify the title of this section by adding the words "Determination of" to clarify that this section is about the determination of the maximum disposal rates.

The commission proposes to amend §336.1307(1) to remove the word "finality" from the phrase "compact waste disposal finality services."

§336.1309, Initial Determination of Rates and Fees

The commission proposes to amend §336.1309 to modify the title of this section by adding the words "Procedures for" and "New and Revised" and deleting the word "Initial" to clarify

the contents of this section.

The commission proposes to amend §336.1309(a) to change the applicability of this section from "initial" rates and fees to "new or revised" rates and fees.

The commission proposes §336.1309(a)(2) to add the requirement that a licensee filing a rate application shall use the data in the submitted application and sustain the burden of proof that the proposed rate changes are just and reasonable and to also add the requirement that the data in the rate application may be modified only on a showing of good cause. The subsequent paragraphs are renumbered accordingly.

The commission proposes to amend renumbered §336.1309(a)(3) to remove the requirement that the executive director recommend one or more rates to the commission for approval and to also add the requirement that the licensee has 20 days to provide information if requested by the executive director, unless a different time is agreed upon.

The commission proposes §336.1309(a)(4) to add that the commission may disallow unsupported costs or expenses in the application if the necessary documentation or other evidence supporting these costs or expenses are not provided within a reasonable time.

The commission proposes to amend renumbered §336.1309(a)(5) to add the requirement that the licensee file with the commission proof of notice in the form of an affidavit stating that proper notice was mailed and the date of such mailing.

The commission proposes to amend renumbered §336.1309(a)(6) to add the requirement of providing notice of the licensee's proposed rates by publication in the *Texas Register*.

The commission proposes to amend §336.1309(b) to remove the applicability of this section from "initial" maximum disposal rates and to also clarify that the generator is a "party state" generator.

The commission proposes to amend §336.1309(c) and (d) to clarify that the generator is a "party state" generator.

The commission proposes to delete §336.1309(e) and (f) concerning initial rate proceedings, because they are no longer needed. The subsequent subsection is re-lettered accordingly.

The commission proposes to amend re-lettered §336.1309(e) to replace "initial" with "new or revised" maximum disposal rates and to also delete "volume adjustment" because it is no longer needed.

§336.1310, Rate Schedule

The commission proposes to amend the figure in §336.1310. The base disposal charge for waste volume is amended to reflect that Class A LLW charges are proposed to be \$100 per cubic foot regardless of Routine or Shielded classification; the waste charge for sources is only for Class A sources; and delete the biological waste charge. The base disposal charge

for radioactivity is amended by changing the curie inventory charge from \$0.55 per millicurie (mCi) to \$0.40 per mCi and to also delete the charges for carbon-14 inventory and for special nuclear material. The surcharges to the base disposal charge is amended to change the weight surcharge by removing the surcharge category of 10,000 to 50,000 pounds; to change the dose rate surcharge by removing the charges for one to five roentgen (R) per hour, greater than five to 50 R per hour, and greater than 50 to 100 R per hour; changing the category of greater than 100 R per hour to greater than 500 R per hour; and, to remove the cask (shielded waste) surcharge of \$2,500 per cask.

§336.1311, Revisions to Maximum Disposal Rates

The commission proposes to amend §336.1311(a) to clarify that the generator is a "party state" generator and to also clarify that rates are for disposal services at the CWF.

The commission proposes §336.1311(b) to add that the maximum disposal rate may be adjusted at the request of the licensee to incorporate inflation adjustments and establishes the methodology of determining the amount of the inflation adjustment. The subsequent subsections are re-lettered accordingly.

The commission proposes to delete existing §336.1311(b) to remove the requirement that the maximum disposal rate shall be the initial rate because this is no longer needed.

The commission proposes to delete existing §336.1311(c) to remove the requirement that the maximum disposal rate be adjusted every January to incorporate inflation and volume

adjustments because this is no longer needed.

The commission proposes §336.1311(d) (which is a modified version of deleted subsection (h) from §336.1305) to add language that the executive director may initiate revisions to the maximum disposal rates if good cause exists. The subsequent subsections are re-lettered accordingly.

The commission proposes §336.1311(d)(1) - (3) to add language to outline examples of good cause circumstances.

The commission proposes §336.1311(e) to add the ability of one or more party state generators to petition the executive director to initiate a revision to the maximum disposal rate and establishes the procedures for the executive director's review of this petition. The subsequent subsections are re-lettered accordingly.

The commission proposes to amend re-lettered §336.1311(f) to exclude inflation adjustments from the requirement that an application for revisions to the maximum disposal rate meet the requirements in §336.1309(a) and (b) and to also change when the licensee must provide notice to its customers about revisions to the maximum disposal rate from any revision to only when it is due to an inflation adjustment.

The commission proposes §336.1311(g) to move the language concerning computing allowable expenses to be its own subsection.

The commission proposes to delete existing §336.1311(f) because it is no longer needed.

§336.1313, Extraordinary Volume Adjustment

The commission proposes to repeal §336.1313 concerning extraordinary volume adjustments, as this rule is obsolete and it is no longer needed.

§336.1317, Contracted Disposal Rates

The commission proposes to amend §336.1317(a) to change who the licensee may contract with from "any person" to a "party state generator."

Fiscal Note: Costs to State and Local Government

Maribel Montalvo, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state government due to the administration or enforcement of the proposed rulemaking. Fiscal implications, not expected to be significant, are expected for Andrews County and those local jurisdictions that own or operate generators of LLRW such as hospitals or nuclear power plants. The proposed rules are anticipated to result in revenue losses for the State's General Revenue Fund and Andrews County, though the loss in revenue is not expected to be significant. Generators of LLRW will experience cost savings due to a reduction in waste disposal fees and surcharges. The cost savings for waste generators will depend on the amount of waste disposed.

The proposed rules are needed to ensure compatibility with federal regulations promulgated by the NRC to preserve the status of Texas as an Agreement State under 10 CFR. In most cases, rules which are designated by the NRC as compatibility items must be adopted by an Agreement State within three years of the effective date of the NRC rules. Additionally, THSC, §401.245, requires the TCEQ to periodically revise party state compact waste disposal fees. The proposed rulemaking would also adjust the surcharge fees for compact waste disposal and remove the annual requirement for rate adjustment for disposal of LLRW to allow flexibility to incorporate rate adjustments on an as-needed basis.

The amendments and repeal are proposed under the Texas Radiation Control Act, which provides the commission the authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, and the recovery and processing of source material. The commission is authorized to adopt rules and guidelines relating to control of sources of radiation and to ensure that the management of LLRW is compatible with applicable federal standards. The commission is required by rule to adopt and periodically revise party state compact waste disposal fees, and THSC, §401.412 provides the authority to regulate licenses for the disposal of radioactive substances. The licensee and operator of the LLRW compact facility in Andrews County, Texas, has also requested rulemaking that would reduce the number and price of surcharges assessed for compact waste disposal and to add clarity and remove obsolete language. This reduction in fees for out-of-compact generators may increase the amount of waste they receive from these generators.

The proposed rulemaking would make several changes. First, the proposed rulemaking would add a requirement for licensees to minimize the introduction of residual radioactivity, including the subsurface, for each site. The effect on licensees from this proposed change is minimal since licensees have always been effectively required to minimize contaminating their site but the NRC added this rule to add emphasis to this requirement.

Second, the proposed rulemaking amends §336.1310 to adjust the surcharge fees for compact waste disposal and to add clarity and remove obsolete language. Currently, the disposal rates serve as a floor for rates charged by the licensee to nonparty generators and the ceiling for rates charged to party state generators for disposal of LLRW. Amending §336.1310 will lower the minimum rate for nonparty generators and the maximum rate for party state generators, resulting in potentially lower disposal costs for both party and nonparty generators.

Third, the proposed rulemaking modifies §336.1311 by removing the annual requirement for rate adjustment for LLRW disposal at the CWF to incorporate inflation and volume adjustments. TCEQ staff determined that annual rate adjustments are not warranted and should be done on an as-needed basis.

Lastly, the rulemaking amends language in §§336.1301, 336.1305, 336.1307, 336.1309, and 336.1317 to add clarity and remove obsolete language, including the repeal of §336.1313.

Under current agency rules, the CWF license holder must remit to the commission 5% of the gross receipts from LLRW received for disposal at the CWF, which is then deposited into the State General Revenue Fund. In addition, the CWF license holder must remit to Andrews County 5% of the gross receipts from LLRW received for disposal at the CWF to be used for public works projects. Reducing the disposal fees will reduce the amount of money deposited into the General Revenue Fund and the amount of funds transferred to Andrews County.

The fee reduction is intended to make disposal at the site a more attractive option for out-of-compact LLRW waste generators. If this proves to be the case, there should be an increase in the amount of waste disposed at the facility and therefore the total revenue generated from disposal may increase, which would increase the overall financial amount generated from the 5% surcharge for the State's General Revenue Fund and Andrews County. However, the agency is not able to estimate the amount of the increase, if any, in revenue from waste disposed at the facility due to the adoption of the proposed rules. Therefore, the agency is not able to estimate any increase in funds transferred to General Revenue or Andrews County that would result from the decrease in fees and surcharges. The decrease in fees could result in some cost savings for LLRW disposal for those local governments who own or operate hospitals, nuclear power plants, or other LLRW generators.

The proposed reduction in disposal fees for LLRW is expected to result in a 12% reduction in revenue deposited to the State's General Revenue Fund, based on current waste streams. The commission collected and transferred to General Revenue approximately \$1.3 million in

Fiscal Year (FY) 2017 from the 5% surcharge for waste subject to the rule change. Based on this amount, the agency anticipates a potential decrease of \$156,000 in funds transferred per year to the General Revenue Fund because of the proposed rule change. The same reduction is expected in funds transferred to Andrews County. Because the 5% surcharge was suspended for FYs 2018 and 2019 by House Bill (HB) 2662, 85th Texas Legislature, 2017, fiscal implications to the General Revenue Fund are not expected to begin until September 1, 2019 (FY 2020). The 5% surcharge suspension from HB 2662 did not apply to Andrews County and, therefore, their revenue reductions would begin after the adoption of this proposed rulemaking.

Public Benefits and Costs

Ms. Montalvo also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen from the implementation of the proposed rules will be minimal, although agency rules would be clearer and allow for more flexible administration of LLRW surcharges and fees.

No fiscal implications are anticipated for any individual due to the implementation or administration of the proposed rules. Privately owned waste generators such as hospitals will be affected. Waste generators will see a reduction in fees that they pay for the disposal of LLRW. Based upon FY 2017 data, approximately \$26 million was generated from the gross receipt fees on the disposal of LLRW. If the proposed rules reduce the fees by 12%, then waste generators will see a cost savings from the reduction in fees of approximately \$3.21 million.

The proposed reduction in disposal fees for LLRW will result in a reduction of revenue generated for the licensee of an estimated \$3.21 million under current waste streams. The LLRW fee adjustment will result in a lowering of the maximum rate that they can charge compact generators of LLRW and a lowering of the minimum rate that they can charge out-of-compact LLRW waste generators. It is not possible for agency staff to determine if reducing the disposal fees will increase the market share of LLRW that will be disposed at the CWF. The proposed rule change should not negatively affect the licensee's revenue stream.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect, except Andrews County which has a population of less than 25,000. The agency anticipates a potential decrease of \$156,000 in funds transferred per year to Andrews County. According to agency staff, this loss of revenue is not expected to significantly impact funding levels that are used for public works projects.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five years the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules do not adversely affect small or micro-businesses for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission reviewed this proposed rulemaking and determined that a Government Growth Impact Statement assessment is not required because the proposed rules do not: create or eliminate a government program; require the creation or elimination of new/existing employee positions; require an increase or decrease in future legislative appropriations to the agency; create a new regulation; expand or limit an existing regulation; increase or decrease the number of individuals subject to the rule's applicability.

During the first five years that the proposed rules would be in effect it is not anticipated that there will be an adverse impact on the state's economy. The proposed rules are expected to: minimize the introduction of residual radioactivity for each affected site; lower the minimum fee rate for nonparty generators and the maximum fee rate for party state

generators, thus potentially lowering disposal costs for both party and nonparty generators; remove the annual requirement for rate adjustment for LLRW disposal at the CWF to incorporate inflation and volume adjustments; and, add clarity and remove obsolete rule language. The fee reduction is intended to increase the amount of waste disposed at the facility and, therefore, the total revenue generated from disposal may increase, which would increase the overall financial amount generated from the 5% surcharge for the State's General Revenue Fund, Andrews County, and the LLRW licensee. The fee reduction will also have cost savings for waste generators.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in the Texas Administrative Procedure Act. A "Major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This proposed rulemaking does not meet the statutory definition of a "Major environmental rule" because it is not the specific intent of the proposed rules to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to ensure that §336.356(c) is compatible with federal regulations

promulgated by the NRC, to adjust the surcharge fees for compact waste disposal, to remove the annual requirement for rate adjustment for disposal of LLRW, and to amend language for clarity and conciseness.

Further, the proposed rulemaking does not meet the statutory definition of a "Major environmental rule" because the proposed rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the proposed rulemaking is not expected to be significant with respect to the economy as a whole or as a sector of the economy; therefore, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the proposed rulemaking does not meet the statutory definition of a "Major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking does not meet the four applicability requirements because

the proposed rules: (1) do not exceed a standard set by federal law; (2) do not exceed an express requirement of state law; (3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the proposed rules; and (4) are not proposed solely under the general powers of the agency, but specifically under THSC, §401.425, which requires the commission to periodically revise party state compact waste disposal fees; and to ensure compatibility with federal regulations promulgated by the NRC.

The commission invites public comment of the Draft Regulatory Impact Analysis Determination. Written comments may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission proposes this rulemaking for the specific purposes of ensuring that §336.356(c) is compatible with federal regulations promulgated by the NRC, adjusting the surcharge fees for compact waste disposal, removing the annual requirement for rate adjustment for disposal of LLRW, and amending language for clarity and conciseness. The proposed rulemaking substantially advances these stated purposes by proposing rules that incorporate NRC regulations requiring a licensee to minimize the introduction of residual radioactivity into a site, including the subsurface, and that are

consistent with the waste disposal fee requirements in THSC, §401.245.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the portions of the proposed rulemaking adopting rules that meet the minimum standards of the federal regulations promulgated by the NRC because Texas Government Code, §2007.003(b)(4) exempts an action reasonably taken, by a state agency, to fulfill an obligation mandated by federal law from the requirements of Texas Government Code, Chapter 2007. Under 10 CFR Part 150 and under the "Articles of Agreement between the United States Atomic Energy Commission and the State of Texas for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended," the state must adopt rules designated by NRC as "compatibility items" to maintain its Agreement State status. Therefore, the portions of the proposed rulemaking adopting rules that meet the minimum standards of the NRC's regulations are exempt from the requirements of Texas Government Code, Chapter 2007 because the rules are required by federal law.

Nevertheless, the commission evaluated the entirety of the proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. Because no taking of private real property would occur by ensuring consistency with NRC regulations requiring a licensee to minimize the introduction of residual radioactivity into a site, including the subsurface; amending the surcharge fees for compact waste disposal; removing the annual requirement for rate adjustment for disposal of LLRW; and amending language for clarity and conciseness, the

commission has determined that promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rules because the proposed rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 28, 2018, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of

registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

<https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-034-336-WS. The comment period closes on July 10, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at

https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Hans Weger, Radioactive Materials Division, at (512) 239-6465.

SUBCHAPTER D: STANDARDS FOR PROTECTION AGAINST RADIATION

§336.356

Statutory Authority

The amendment is proposed under: the Texas Radiation Control Act, Texas Health and Safety Code (THSC), Chapter 401: THSC, §401.011, which provides the commission the authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, and the recovery and processing of source material; THSC, §401.051, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.151, which authorizes the commission to ensure that the management of low-level radioactive waste is compatible with applicable federal commission standards; THSC, §401.412, which provides authority to the commission to regulate licenses for the disposal of radioactive substances; and Title 10 Code of Federal Regulations (CFR) Part 150 which is necessary in order to preserve Texas as an Agreement State pursuant to 10 CFR Part 150. It is also proposed as authorized by Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; and TWC, §5.103, which establishes the commission's general authority to adopt rules.

The proposed amendment implements THSC, Chapter 401, and is proposed to meet compatibility standards set by the United States Nuclear Regulatory Commission.

§336.356. Soil and Vegetation Contamination Limits.

(a) No licensee may possess, receive, use, or transfer licensed radioactive material in such a manner as to cause contamination of soil or vegetation in unrestricted areas that causes a member of the public to receive a total effective dose equivalent in excess of 25 millirem (mrem)/year from all pathways (excluding radium and its decay products) and to the extent that the contamination exceeds the background level by more than:

(1) for radium-226 or radium-228 in soil, the following limits, based on dry weight, averaged over any 100 square meters of area:

(A) 5 picocuries/gram (pCi/g), averaged over the first 15 centimeters of soil below the surface;

(B) 15 pCi/g, averaged over each 15-centimeter thick layer of soil below the first 15 centimeters below the surface; and

(2) for radium-226 or radium-228 in vegetation, 5 pCi/g, based on dry weight.

(b) Regardless of [Notwithstanding] the limits set forth in subsection (a) of this section, each licensee shall make every reasonable effort to maintain any contamination of soil or vegetation as low as is reasonably achievable [(ALARA)].

(c) Licensees shall, to the extent practical, conduct operations to minimize the introduction of residual radioactivity into the site, including the subsurface in accordance with the existing radiation protection requirements in §336.304 of this title (relating to Radiation Protection Programs) and radiological criteria for license termination in Subchapter G of this chapter (relating to Decommissioning Standards). If contamination caused by the licensee is detected in an unrestricted area, the licensee shall decontaminate any unrestricted area which is contaminated above the limits specified in subsection (a) of this section.

SUBCHAPTER N: FEES FOR LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

§§336.1301, 336.1305, 336.1307, 336.1309 - 336.1311, 336.1317

Statutory Authority

The amendments are proposed under the Texas Radiation Control Act, Texas Health and Safety Code (THSC), §401.011, which provides the commission the authority to regulate and license the disposal of radioactive substances; and THSC, §401.245, which requires the commission, by rule, to adopt and periodically revise party state compact waste disposal fees. The proposed amendment is also authorized by Texas Water Code (TWC), §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state.

The proposed amendments implement THSC, §401.245.

§336.1301. Purpose and Scope.

(a) State and national policy directs that the management of low-level radioactive waste be accomplished by a system of interstate compacts and the development of regional disposal sites. Under federal law, Texas is responsible for managing the low-level radioactive waste generated within its borders. The Texas Low-Level Radioactive Waste Disposal Compact, comprised of the states of Texas and Vermont, has as its disposal facility the compact waste disposal facility licensed under Subchapter H of this chapter (relating to Licensing Requirements Near-Surface Land Disposal of Low-Level Radioactive Waste). [The

compact waste disposal facility is expected to be the sole facility for disposal of low-level radioactive waste for generators within the states of Texas and Vermont.]

(b) Low-level radioactive waste is generated by essential activities and services that benefit the citizens of the state. The price to dispose [For the Compact Waste Facility Disposal, the price of disposing] of low-level radioactive waste at the Texas low-level radioactive waste disposal site will be determined by the commission. To protect Texas and Vermont compact states' businesses and services, such as electrical production, medical and university research, and private industries, upon which the public relies, the commission will establish the maximum disposal rates charged by the licensee for disposal of party state compact waste in accordance with the rules in this subchapter.

(c) A licensee who receives low-level radioactive waste for disposal pursuant to the Texas Low-Level Radioactive Waste Disposal Compact established under Texas Health and Safety Code, Chapter 403 shall collect a fee to be paid by each person who disposes of [delivers] low-level radioactive waste in [to] the compact waste disposal facility [for disposal]. This fee shall be based on the commission approved maximum disposal rate, as specified in this subchapter.

§336.1305. Commission Powers.

(a) The commission shall adopt maximum disposal rates for disposal of party state compact waste at the compact waste disposal facility [establish rates to be charged by the

licensee]. In determining [establishing] the rates, the commission shall ensure that they are fair, just, reasonable, and sufficient considering the value of the licensee's real property and license interests, the unique nature of its business operations, the licensee's liability associated with the site, its investment incurred over the term of its operations, and the reasonable rate of return equivalent to that earned by comparable enterprises.

(b) The commission may use any standard, formula, method, or theory of valuation reasonably calculated to arrive at the objective of prescribing and authorizing fair, just, reasonable, and sufficient rates.

(c) In any proceeding involving a new [an initial] or revised [a change of] rate, the burden of proof shall be on the licensee to show that the proposed rate, if proposed by the licensee, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable. In any other matters or proceedings, the burden of proof is on the moving party.

(d) The commission may refer a request for a contested case hearing to the State Office of Administrative Hearings on the establishment of a rate under this subchapter.

(e) The commission may audit a licensee's financial records and waste manifest information to ensure that the fees imposed under this chapter are accurately charged and paid. The licensee shall comply with the commission's audit-related requests for information.

(1) To achieve the purposes, proper administration, and enforcement of this chapter, the executive director may conduct audits or investigations of waste disposal rates, payments and fees authorized by Texas Health and Safety Code, Chapter 401, and the veracity of information submitted to the commission.

(2) Each person subject to or involved with an audit or investigation under this subsection [(a) of this section] shall cooperate fully with the audit or investigation conducted by the executive director.

(f) After consideration of a [initial] rate application or revision, the commission shall establish, by rule, the maximum disposal rate and schedule.

(g) The authority to establish the rates under this subchapter may be [maybe] delegated to the executive director if the application is not contested.

[(h) Initiation of rate revision by the executive director.]

[(1) If good cause exists, the executive director may initiate revisions to the maximum disposal rates established under this subchapter which may include a true-up proceeding, subject to notice and opportunity for a contested case hearing. No revision to the maximum disposal rate is final until approved in the commission's rules establishing the maximum disposal rate. Good cause includes, but is not limited to:]

[(A) there are material and substantial changes in the information used to establish the maximum disposal rates;]

[(B) information, not available at the time the maximum rates were established, is received by the executive director, justifying a rate revision; or]

[(C) the rules or statutes on which the maximum disposal rates were based have been changed by statute, rule, or judicial decision after the establishment of the maximum disposal rates.]

[(2) One or more generators may petition the executive director to initiate a revision to the maximum disposal rate under the requirements of this subsection. The generator must provide a copy of the petition to the licensee at the time the petition is submitted to the executive director. The executive shall grant or deny the petition within 90 days of filing, or request more information from the petitioner. The executive director's decision on a petition filed under this paragraph is subject to a motion to overturn filed with the commission under Chapter 50 of this title (relating to Actions on Applications and Other Authorizations).]

§336.1307. Factors Considered for Determination of Maximum Disposal Rates.

Maximum disposal rates adopted by the commission shall consider the following factors and be sufficient to:

(1) allow the licensee to recover allowable expenses. Allowable expenses shall never include: legislative advocacy expenses; political expenditures or contributions; expenses in support of or promoting political movements, or political or religious causes; funds expended for membership in or support of social, fraternal, or religious clubs or organizations; costs, including interest expense, of processing a refund or credit ordered by the commission; or any expenditure found by the commission to be unreasonable, unnecessary or against public interest, including but not limited to, executive salaries, legal expenses, penalties, fines, or costs not used or useful for the provision of compact waste disposal [finality] services;

(2) provide an amount to fund local public projects under Texas Health and Safety Code, §401.244;

(3) provide a reasonable opportunity to earn a reasonable rate of return on invested capital in the facilities used for management, disposal, processing, or treatment of compact waste at the compact waste disposal facility, which rate of return is expressed as a percentage of invested capital. In addition to the factors set forth in §336.1303(13) of this title (relating to Definitions), the rate of return should be reasonably sufficient to assure confidence in the financial soundness of the licensee and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low because of changes affecting

opportunities for investment, the money market, and business conditions generally. The commission may, in addition, consider inflation, deflation, and the need for the licensee to attract new capital. The rate of return must be high enough to attract new capital but need not go beyond that. In each case, the commission shall consider the licensee's cost of capital, which is the weighted average of the costs of the various classes of capital used by the licensee:

(A) Debt capital. The cost of debt capital is the actual cost of the debt at the time of issuance, plus adjustments for premiums, discounts, and refunding and issuance costs.

(B) Equity capital. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock:

(i) Common stock capital. The cost of common stock capital shall be based upon a fair return on its market value; or

(ii) Preferred stock capital. The cost of preferred stock capital is the actual cost of preferred stock at the time of issuance, plus an adjustment for premiums, discounts and refunding and issuance costs; and

(4) provide an amount necessary to pay compact waste disposal facility licensing fees, to pay compact waste disposal facility fees set by rule or statute, to provide

financial assurance for the compact waste disposal facility as required by the commission under law and commission rules, and to reimburse the commission for the salary and other expenses of two or more resident inspectors employed by the commission pursuant to Texas Health and Safety Code, §401.206.

§336.1309. Procedures for [Initial] Determination of New and Revised Rates and Fees.

(a) The licensee shall file an application with the executive director to establish new or revised [initial] maximum disposal rates that consider the factors identified in §336.1307 of this title (relating to Factors Considered for Determination of Maximum Disposal Rates). The application shall include exhibits, workpapers, summaries, annual reports, cost studies, a proposed reasonable rate of return on invested capital, proposed fees, and other information as requested by the executive director to demonstrate rates that meet the requirements of this subchapter. In addition, the application shall include revenue requirements for cost recovery from the compact waste disposal facility.

(1) The licensee shall submit a rate filing application package in accordance with the application prescribed by the executive director.

(2) A licensee filing a rate application shall be prepared to go forward at the hearing on the data which has been submitted in its application and sustain the burden of proof establishing that its proposed changes are just and reasonable. The data in the rate application may be modified only on a showing of good cause.

(3) [(2)] After receipt of the application, the executive director shall review the application [and recommend one or more rates to the commission for approval. In reviewing the application] and evaluate [evaluating] the rate information. The [, the] executive director may request additional information from the licensee and the licensee shall provide that information within 20 days of receipt of request, unless a different time is agreed to.

(4) If the licensee fails to provide, within a reasonable time after the application is filed, the necessary documentation or other evidence that supports the costs and expenses that are shown in the application, the commission may disallow the unsupported costs or expenses.

(5) [(3)] The licensee shall provide notice of the application to all known customers that will ship or deliver waste to the compact waste disposal facility and shall provide notice of the application to any person by any method as directed by the executive director. The licensee shall file with the commission proof of notice in the form of an affidavit stating that proper notice was mailed and the date of such mailing.

(6) [(4)] The executive director shall maintain a Web site to inform the public on the process for consideration of the rate application and shall provide notice of the licensee's proposed rates by publication in the *Texas Register*.

(b) After notice and the opportunity for a contested case hearing, the commission shall establish the [initial] maximum disposal rates that may be charged by the licensee. Upon request for a contested case hearing by a party state [waste] generator [in the Texas Compact], the executive director shall directly refer an application to establish maximum disposal rates to the State Office of Administrative Hearings for a contested case hearing. Only the executive director, the licensee, or a party state generator has a right to a contested case hearing.

(c) A request for a contested case hearing filed by a party state generator shall contain the following information for each signatory generator:

(1) a clear and concise statement that the application is a request for a contested case hearing; and

(2) the generator's licensing numbers indicating the location or locations where the compact waste is generated.

(d) Party state generators [Generators] must initiate a request for a contested case hearing by filing individual requests rather than joint requests.

[(e) In the initial rate proceeding, the commission also shall determine the factors necessary to calculate the inflation adjustment, volume adjustment, extraordinary volume adjustment, and relative hazard.]

[(f) Initial rates shall be interim rates subject to a true-up in the first revision to maximum disposal rates pursuant to §336.1311 of this title (relating to Revisions to Maximum Disposal Rates). The true-up will measure the differences between projected and actual volumes of cubic feet of waste, allowable expenses, and invested capital for the time period that the interim rates are in effect, based on actual, historical amounts during that time period. The licensee shall refund to the generators who paid interim rates where money collected under the interim rates that is in excess of the adopted rates; or the licensee shall surcharge bills to the generators who paid interim rates to recover the amount by which the money collected under interim rates is less than the money that would have been collected under adopted rates.]

(e) [(g)] After determining the new or revised [initial] maximum disposal rates and [,] inflation adjustment [, and volume adjustment] under this subchapter, the commission shall direct the executive director to initiate expedited rulemaking to establish the rate by rule.

§336.1310. Rate Schedule.

Fees charged for disposal of party state [party-state] compact waste must be equal to or less than the compact waste disposal fees under this section. Additionally, fees charged for disposal of nonparty compact waste must be greater than the compact waste disposal fees under this section.

Figure: 30 TAC §336.1310

[Figure: 30 TAC §336.1310]

Disposal Rate for the Compact Waste Disposal Facility

1. Base Disposal Charge:

1A. Waste Volume Charge	Charge per cubic foot (\$/ft ³)
<u>Class A LLW</u>	<u>\$100</u>
[Class A LLW – Routine]	[\$100]
[Class A LLW – Shielded]	[\$180]
Class B and C LLW	\$1,000
<u>Sources – Class A</u>	<u>\$500</u>
[Biological Waste (Untreated)]	[\$350]

1B. Radioactivity Charge	
Curie Inventory Charge (\$/ <u>millicurie</u> (mCi))	<u>\$0.40</u> [0.55]
Maximum Curie Charge (per shipment) (excluding C-14)	\$220,000/shipment
[Carbon-14 Inventory Charge (\$/mCi)]	[\$1.00]
[Special Nuclear Material Charge (\$/gram)]	[\$100]

2. Surcharges to the Base Disposal Charge:

2A. Weight Surcharge - Weight (lbs.) of Container	Surcharge (\$/container)
[10,000 to 50,000 lbs]	[\$10,000]
Greater than 50,000 lbs	\$20,000

2B. Dose Rate Surcharge - Surface Dose Rate (R/hour) of Container	Surcharge per cubic foot (\$/ft ³)
[1-5 R/hour]	[\$100]
[Greater than 5 to 50 R/hour]	[\$200]
[Greater than 50 to 100 R/hour]	[\$300]

Greater than <u>500</u> [100] R/hour	\$400
2C. Irradiated Hardware Surcharge	
Surcharge for special handling per shipment	\$75,000/shipment
[2D. Cask (Shielding Waste) Surcharge]	
[Cask handling surcharge per cask]	[\$2,500/cask]

§336.1311. Revisions to Maximum Disposal Rates.

(a) The maximum disposal rates that a licensee may charge party state generators shall be determined in accordance with this section, and §336.1307 of this title (relating to Factors Considered for Determination of Maximum Disposal Rates). The rates shall include all charges for disposal services at the compact waste disposal facility [site].

(b) The maximum disposal rates may be adjusted at the request of the licensee to incorporate inflation adjustments. If an inflation adjustment is requested, the maximum disposal rates shall be adjusted by a percentage equal to the change in price levels in the preceding period. The adjustment shall be made using an inflation factor derived from the most recent annual Implicit Price Deflator for Gross National Product published by the United States Department of Commerce in its Survey of Current Business.

[(b) Initially, the maximum disposal rates shall be the initial rates established pursuant to §336.1309 of this title (relating to Initial Determination of Rates and Fees).]

[(c) Subsequently, the maximum disposal rates shall be adjusted in January of each year to incorporate inflation adjustments and volume adjustments. Such adjustments shall take effect unless the commission authorizes that the adjustments take effect according to an alternate schedule.]

(c) [(d)] The licensee may [also] file an application for revisions to the maximum disposal rates due to:

(1) changes in any governmentally imposed fee, surcharge, or tax assessed on a volume or a gross receipts basis against or collected by the licensee, including site closure fees, perpetual care and maintenance fees, business and occupation taxes, site surveillance fees, commission regulatory fees, taxes, and a tax or payment in lieu of taxes authorized by the state to compensate the county in which a site is located for that county's legitimate costs arising out of the presence of that site within that county;

(2) factors outside the control of the licensee such as a material change in regulatory requirements regarding the physical operation of the site; or

(3) changes in the licensee's revenue requirements or in any of the other factors in §336.1307 of this title that necessitate a change in the licensee's maximum disposal rates.

(d) The executive director may initiate revisions to the maximum disposal rates established under this subchapter if good cause exists. Good cause includes, but is not limited to:

(1) material and substantial changes in the information used to establish the maximum disposal rates;

(2) information, not available at the time the maximum rates were established, is received by the executive director, justifying a rate revision; or

(3) the rules or statutes on which the maximum disposal rates were based have been changed by statute, rule, or judicial decision after the establishment of the maximum disposal rates.

(e) One or more party state generators may petition the executive director to initiate a revision to a maximum disposal rate under the requirements of this section. The party state generator must provide a copy of the petition to the licensee at the time the petition is submitted to the executive director. The executive director shall grant or deny the petition within 90 days of filing, or request more information from the petitioner. The party state generator must provide a detailed and complete explanation of the existence of the good cause that is the basis of the petition. The executive director's decision on a petition filed under this paragraph is subject to a motion to overturn filed with the commission under Chapter 50 of this title (relating to Actions on Applications and Other Authorizations).

(f) [(e)] For revisions to maximum disposal rates, ~~excluding inflation adjustments~~, the application must meet the requirements in §336.1309(a) and (b) of this title ~~(relating to Procedures for Determination of New and Revised Rates and Fees)~~. For revisions to maximum disposal rates due to an inflation adjustment, the licensee shall provide notice to its customers consistent with §336.1309(a)(5) of this title.

(g) In computing allowable expenses for revisions to maximum disposal rates, only the licensee's test year expenses as adjusted for known and measurable changes will be considered.

[(f) For any revisions to the maximum disposal rates, including inflation and volume adjustments, the licensee shall provide notice to its customers concurrent with the filing as consistent with §336.1309(a)(3) of this title.]

§336.1317. Contracted Disposal Rates.

(a) At any time, a licensee may contract with a party state generator [any person] to provide a contract disposal rate that is lower than the maximum disposal rate.

(b) A contract or contract amendment shall be submitted to the executive director for approval at least 30 days before its effective date. If the executive director takes no action within 30 days of filing, the contract or amendment shall go into effect according to its

terms. Each contract filing shall be accompanied with documentation to show that the contract does not result in unreasonable discrimination between generators receiving like and contemporaneous service under substantially similar circumstances and provides for the recovery of all costs associated with the provision of the service.

SUBCHAPTER N: FEES FOR LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

[§336.1313]

Statutory Authority

This repeal is proposed under the Texas Radiation Control Act, Texas Health and Safety Code (THSC), §401.011, which provides the commission the authority to regulate and license the disposal of radioactive substances; and THSC, §401.245, which requires the commission, by rule, to adopt and periodically revise party state compact waste disposal fees. The proposed repeal is also authorized by Texas Water Code (TWC), §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state.

The proposed repeal implements THSC, §401.245.

[§336.1313. Extraordinary Volume Adjustment.]

[(a) In establishing the extraordinary volume adjustment, unless the licensee and generator of the extraordinary volume agree to a contract disposal rate, one-half of the extraordinary volume delivery shall be priced at the maximum disposal rate and one-half shall be priced at the licensee's incremental cost to receive the delivery. Such incremental cost shall be determined in the initial rate proceeding.]

[(b) For purposes of the subsequent calculation of the volume adjustment, one-half of the total extraordinary volume shall be included in the calculation.]